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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

# DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Yun YOSHIDA (Japan)

## ARTICLES 46 AND 47

### Penalties

1. Two main issues emerged from the discussion: the type of penalties and the relevant laws for determining penalties.

2. It was noted that the principle of legality (Nulla poena sine lege) required that penalties be defined in the draft statute of the Court as precisely as possible. The link was stressed between sentencing and penalties which should reflect the different degrees of culpability. A view was expressed that maximum and minimum penalties for each crime should be carefully set out in the draft statute. There was also a suggestion to include detailed regulations concerning, for example, minors, aggravating or attenuating circumstances (severity of damage or injury, prior conduct of the accused, means of commission of the crime, etc.), cumulative penalties for multiple crimes, an exhaustive list of aggravating circumstances and a non-exhaustive list of attenuating circumstances.

3. Life imprisonment and imprisonment for a specified period of time (years and/or months) were generally considered to constitute the basic penalties under the draft statute. Fines as a separate penalty were considered inadequate in view of the seriousness of the crimes and, moreover, the court might have difficulty collecting the fines owing to the lack of an enforcement mechanism under the draft statute. It was, however, recognized that fines might be appropriate for such "procedural" crimes as perjury or contempt of court or as supplementary to a penalty of imprisonment. The imposition of other penalties, such as disenfranchisement, denial or suspension of political rights or public office for the convicted, were also suggested.

4. While the death penalty was ruled out by some, others suggested that the death penalty should not be excluded a priori since it was provided for in many legal systems, especially in connection with serious crimes.

5. It was also noted that provisions concerning compensation of victims, restitution of property acquired through crime and the confiscation of property of the convicted, as well as provisions concerning penalties for legal persons (political organizations and youth movements, etc.) such as dissolution, confiscation and the like, should also be considered for inclusion in the draft statute. Many problems were raised in connection with the complex issue of compensation for the victims, including compensating a large number of victims of civil war, locating the source of funding and establishing criteria for distributing funds.

6. Regarding the relevant laws for determining penalties, various comments were made as regards the States whose national laws the court might take into account: (a) the State of nationality of the convicted person, (b) the State where the crime was committed, and (c) the State which had custody of and jurisdiction over the accused. A view was expressed that taking into account the various national laws had the drawback of vagueness and imprecision which could be contrary to the principle of legality. Moreover, this could result in manifest inequality and inconsistency, since domestic laws were not always identical in the penalties prescribed even for the same crimes. One suggestion was that the draft statute should include an international standard for the various crimes; the jurisprudence and the experience of the court could gradually expand this area. Another view, however, considered that the "renvoi" (referral) to national legislation could constitute a compromise among differing concepts and a solution to the difficult problem of determining the gravity of penalties. In the event that the national legislation did not provide for a specific crime, its provisions for an analogous crime could be taken into account.

7. It was suggested that the Court should have competence to impose appropriate punishment in cases where the convicted was sentenced for a lesser crime than he/she was originally indicted for. It was further suggested that the period of incarceration already served by the convicted prior to trial should be taken into account in his or her serving of the term of imprisonment.

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